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IN THE DISTRICT COURT OF GUAM
TERRITORY OF GUAM

* * *

FILED
DISTRICT COURT OF GUAM
JAN 26 2004
MARY L. M. MORAN
CLERK OF COURT
149

TONY H. ASHTIANI,

Plaintiff,

vs.

CONTINENTAL MICRONESIA, INC.,
dba CONTINENTAL MICRONESIA, and
CONTINENTAL AIRLINES, INC.,
Defendants.

CASE NO. CV02-00032

TRANSCRIPT OF PROCEEDINGS

BEFORE

THE HONORABLE JOHN S. UNPINGCO

Chief District Judge

PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT
and
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

FRIDAY, DECEMBER 12, 2003

Wanda M. Miles
Official Court Reporter
District Court of Guam

ORIGINAL

1 **APPEARANCES:**

2
3 FOR THE PLAINTIFF:

4 TONY S. ASHTIANI
5 Pro se litigant
6 P.O. Box 12723
7 Tamuning, Guam 96931

8 FOR THE DEFENDANT CONTINENTAL AIRLINES, ETC:

9 CARLSMITH BALL, LLP
10 Attorneys At Law
11 BY: ELYZE McDONALD, ESQ.
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14 Hagatna, Guam 96910

1 HAGATNA, GUAM; FRIDAY, DECEMBER 12, 2003; 11:07 A.M.

2 * * *

3 THE CLERK: Civil case 02-00032, Tony H.
4 Ashtiani versus Continental Micronesia, Inc., et
5 cetera, et al., motion for partial summary judgment,
6 and motion for summary judgment.

7 Counsel, please state your appearances.

8 MS. McDONALD: Your Honor, Elyze McDonald for
9 defendant Continental Micronesia, Inc., with Mr. Dixon
10 McKinzie, who is the Human Resources Director of
11 Continental.

12 MR. ASHTIANI: Your Honor, Tony H. Ashtiani,
13 pro se litigant.

14 THE COURT: Okay. Let's start with the
15 defense motion.

16 MS. McDONALD: Thank you, Your Honor.

17 May it please the court.

18 First I'd like to thank the court for its
19 order granting me to appear telephonically. As you've
20 noticed since giving that order, based on a family
21 emergency that brought me to Guam, so I'm able to make
22 it here for the motion hearing.

23 I want to start off just by stating what the
24 undisputed facts are in this case, and then attempt to
25 talk about both motions.

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1 The first undisputed fact is that attendance
2 procedures at Continental are governed both by
3 Continental attendance policy and by the union
4 agreement between Continental and the International
5 Brotherhood of Teamsters. Both documents say that if
6 an employee is going to be absent for work, he needs
7 to call in and talk to his supervisor. That's an
8 undisputed fact.

9 The second undisputed fact is that
10 Mr. Ashtiani did not call in for work on two
11 consecutive days, June 23rd and 24th, 2001. In those
12 two documents, the two attendance policies, two days no
13 reporting to work and not showing up for work is cause
14 for discipline, not to exclude termination. And it
15 says that in both documents.

16 The last undisputed fact is that Continental
17 discharged Mr. Ashtiani on July 3rd, 2001. And as
18 you'll see from our Exhibit C, it was for the basis
19 that he didn't show up and call in to report his
20 absence to his supervisor for June 23rd and June 24th.

21 With that in mind, the standard that the Court
22 needs to engage in analyzing this motion is that the
23 plaintiff, in order to defeat summary judgment, needs
24 to provide significant probative evidence for his case
25 that any genuine issue of material fact exists.

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1 There are eight causes of action in this case,
2 as you can see from the second amended complaint, but
3 the central cause of action is discrimination on the
4 basis of race. And in that, the Supreme Court has
5 prescribed a formula, as you're aware, with McDonnell
6 Douglas formula where the plaintiff first has to show a
7 pattern in each case of discrimination, then the burden
8 shifts to defendant to show a non-discriminatory,
9 legitimate reason for the termination, and then the
10 burden shifts back to the plaintiff to show pretext.

11 In a discharge case, the Ninth Circuit has
12 said that the plaintiff needs to show that he was doing
13 his job well enough throughout the possibility that he
14 was discharged for some other reason. And the fact is
15 that he failed to show up for work and talk to his
16 supervisor to get approval for two consecutive days.
17 And under the rules of Continental and International
18 Brotherhood of Teamster, he violated that policy by
19 not doing that. That in itself shows that he was not
20 performing adequately at work.

21 So the burden then shifts to Continental to
22 show a legitimate, non-discriminatory reason. And
23 that's the same reason; he didn't show up for work,
24 he didn't report his absence and get approval from the
25 supervisor. It's the same reason for why he wasn't

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1 performing adequately.

2 So then the burden shifts back to Ashtiani, to
3 Mr. Ashtiani to show pretext. And the Ninth Circuit
4 has two rules: You have to show direct evidence of
5 discrimination, of which Mr. Ashtiani has not provided,
6 or you provide indirect evidence that the reason that
7 Continental furnished for terminating him was false.
8 He hasn't provided any evidence that Continental's
9 reason was false.

10 And I wanted to discuss just briefly the
11 evidence that he has provided. None of it meets the
12 standard required under the summary judgment, or a
13 clear majority of it. His affidavits, he has only
14 provided affidavits by himself that are sworn. The
15 other affidavits are not sworn testimony, they're not
16 admissible before the Court.

17 He's provided declarations from people, and
18 if you read the notarization on the declarations, the
19 notary is only notarizing that he has brought to the
20 notary a copy of a document that somebody else has
21 signed. This is not legitimate for a summary judgment,
22 in support of a position for summary judgment.

23 He has provided doctor's reports that are
24 illegible. He has provided statistical studies with
25 no information who did the study, what is it studying,

1 what was the base, what, you know, what was his back-
2 ground in being able to provide this sort of study.
3 This is evidence that the court should not consider.
4 And as you've seen from reply, we have requested a
5 motion to strike all the unauthenticated evidence.

6 Every other count, Your Honor, is superfluous
7 to this discrimination case. A lot of it has
8 absolutely no basis in the law, and there's no -- he
9 hasn't provided any authenticated evidence in support
10 of any of his other claims.

11 So unless the Court has any questions on
12 particular pieces of evidence, or on any count,
13 Continental will rest for now, and wait for
14 Mr. Ashtiani's response.

15 THE COURT: Okay.

16 MS. McDONALD: Thank you.

17 THE COURT: Mr. Ashtiani.

18 MR. ASHTIANI: May I?

19 THE COURT: Yes.

20 MR. ASHTIANI: Thank you, Your Honor.

21 Your Honor, first good morning.

22 And I'd like to say good morning to defense.

23 And that first and most, Your Honor, I want
24 to apologize because last time I was here arguing my
25 motion, I sat down on that table in front of my tables

1 and I did not know to stand here, but now I know
2 because I watched other arguments.

3 Your Honor, I filed a partial summary judgment
4 because I selected those cause of action that I could
5 meet the elements.

6 THE COURT: Okay, let me steer you a little
7 bit, Mr. Ashtiani. There's some important things that
8 we're looking at, right now we're looking at the
9 defendant's motion, and when they done I'll turn to
10 your motion.

11 MR. ASHTIANI: Yes, Your Honor. The only
12 difference --

13 THE COURT: So I need you to respond. There
14 are some legitimate questions being raised here.

15 MR. ASHTIANI: Okay, Your Honor.

16 THE COURT: And one of the legitimate
17 questions being raised is the evidence you have
18 submitted that are unauthenticated. Okay. And
19 unauthenticated evidence is evidence that really is
20 of dubious value, and that's why most courts say it's
21 inadmissible. Okay. There's no safeguard for the
22 truth in it. Let me give you an example here.

23 When you submit an affidavit, you swear under
24 oath that the statements you're going to make are true
25 and correct. Okay. That's a safeguard for the truth.

1 But when you submit, say, what somebody has written to
2 a notary to notarize, there's no safeguard for the
3 truth because it is you submitting somebody else's
4 declaration. You can't vouch for that person's
5 truthfulness; the notary can't vouch for that person's
6 truthfulness. The net result is that that kind of
7 evidence is very suspect and often not allowed into
8 court.

9 Now, that being the case, do you have any --
10 besides the information you have submitted, is there
11 any other information that, or evidence that you have
12 that is authenticated?

13 MR. ASHTIANI: Your Honor --

14 THE COURT: Safeguards for the truth?

15 MR. ASHTIANI: Your Honor, all the evidence
16 that I have submitted are basically on my personal
17 knowledge, which is in the Rule 56 that says based on
18 the personal knowledge, which I have done those in each
19 paragraphs.

20 THE COURT: Okay.

21 MR. ASHTIANI: In lieu of that, Your Honor,
22 Rule 56(e) states that certified copy attached to the
23 affidavit part of, which I've done that also; I took
24 in these original documents that were signed by the
25 employees, and I have given it to the notary, I showed

1 him the certified copy -- I showed him the original
2 copy and he has certified those copies of the original.

3 THE COURT: Yes, but that certification goes
4 only to the fact this is an accurate copy of the
5 original.

6 MR. ASHTIANI: Right.

7 THE COURT: It does not go to the contents of
8 the document. That's the issue here. It is what is
9 stated in the documents that we are interested in, in
10 terms of assessing how truthful those contents are.

11 MR. ASHTIANI: Your Honor, all these
12 individuals that had given their statements, they're
13 very credible individuals, and I do not see any
14 difference between their affidavit which I have
15 submitted, with the affidavit that Mr. McKinzie has
16 submitted, all the facts that he had stated that, is
17 that I'm submitting my facts, based on my personal
18 knowledge. So, basically, I do not really see the
19 difference between his affidavit and the affidavit
20 that I have submitted.

21 THE COURT: Okay.

22 MR. ASHTIANI: And basically, Your Honor, it's
23 the fact that the two days no-call no-show. We have
24 evidence of the shift schedule that there has been many
25 individuals that have called in and they have called in

1 to another mechanic; they do not directly have to talk
2 to a supervisor.

3 Now what is before the court is that that
4 application has applied to a certain race and
5 nationality of the majority, and Ashtiani among all
6 the employees, they must call in direct to the
7 supervisor. That is a disparate treatment, Your Honor,
8 under the strict impact.

9 THE COURT: But in order for you to show that
10 in a court of law, you have to get an affidavit from
11 these other mechanics that called in to another
12 mechanic, not a supervisor; they're the ones that have
13 to make a sworn statement that on such and such a date
14 I called in sick or whatever, I told this mechanic and
15 the mechanic related to the supervisor or whatever, and
16 I was never reprimanded and no adverse action was given
17 to me for having done this procedure, or for having
18 been absent from work, or both. Okay?

19 MR. ASHTIANI: Yes.

20 THE COURT: That's the kind of proof we need.
21 Now absent that kind of proof -- what you know is fine,
22 but, you know, you need to understand you're also the
23 party at interest here, that is that, you're the one
24 with the most to lose, should you lose. Okay. So,
25 there is of course some caution that needs to be given

1 whether to believe everything you say.

2 MR. ASHTIANI: Uh-huh.

3 THE COURT: Okay. And so that's what we're
4 after here.

5 MR. ASHTIANI: Your Honor, Mr. McKinzie also
6 has interest in this party, and in his affidavit we do
7 not know that the documents presented before us if it's
8 authenticated in reference to the e-mails.

9 And, Your Honor, if I may, please, I knew that
10 this thing might come up, and what the defendant is
11 basically saying that these are hearsay documents under
12 Rule 803, and that in the United case, Your Honor,
13 United asserts the court here in failing to admit these
14 exhibits as exception to the hearsay rule under Federal
15 Rules of Evidence 801, 803 and 803(a)(c). Even if
16 United exhibits are admissible as exception to the
17 hearsay rule, the trial court still has the duty to
18 balance the probative value of the evidence against its
19 potential for unfair prejudice under Federal Rules of
20 Evidence 403.

21 THE COURT: Well, what exception to the
22 hearsay rule are you advocating for those documents
23 you're trying to get in?

24 MR. ASHTIANI: Basically, Your Honor, some of
25 those documents can be self-authenticated, which I have

1 done, and it's under the exception of the rule, Rule
2 803 or 802.

3 THE COURT: Are they business records, are
4 they --

5 MR. ASHTIANI: Basically, Your Honor, those
6 documents that I have submitted, they came out of
7 Continental Micronesia maintenance office, which
8 basically says that these employees had called in
9 another mechanic, not the supervisor, and that's what
10 I have submitted. And I have sworn, subscribed sworn
11 before the notary that those documents are legitimate
12 document, Your Honor.

13 THE COURT: Okay.

14 MR. ASHTIANI: Furthermore, Your Honor,
15 balancing the probative value of the evidence against
16 its potential of prejudice is a discretionary decision
17 for the trial judge, which will be not overturned
18 unless it's clearly erroneous.

19 Your Honor, I have not submitted any erroneous
20 evidence; I have submitted what has come from the
21 maintenance office, from my co-worker, and I have asked
22 them that if they can bring any samples that any
23 mechanic has called another mechanic, not the
24 supervisor, which I have done so.

25 THE COURT: Well, but you're misreading the

1 rule. The rule is whether the, when the judge admits
2 the evidence, the judge has made an error in admitting
3 the evidence. It is not whether the evidence is
4 erroneous in and of itself, it's the substance of the
5 evidence; whether it's erroneous is not what's at
6 issue. What is at issue is whether the judge abused
7 his discretion, that is, he did something that he
8 shouldn't have done.

9 But, go ahead.

10 MR. ASHTIANI: Okay, Your Honor. And I just
11 want to tell you that those documents that I have
12 submitted, they're all -- they're all legitimate
13 document, there's nothing that I have turned in, and
14 I respectfully ask the court to examine it and check
15 into it in going through this.

16 THE COURT: Thank you.

17 MR. ASHTIANI: Thank you, Your Honor.

18 THE COURT: Anything else?

19 MR. ASHTIANI: Not at this point, Your Honor.

20 THE COURT: Thank you.

21 Response, if necessary, or do you stand by
22 your earlier argument, Ms. McDonald?

23 MS. McDONALD: May I just make one point, Your
24 Honor?

25 THE COURT: Yes.

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1 MS. McDONALD: Mr. Ashtiani raises his
2 unauthenticated evidence that other employees were
3 allowed to call in and report absences for work but
4 didn't have to speak to a supervisor. This still
5 doesn't fulfill the burden that he has to show that
6 Continental's reason for terminating him was false,
7 that's the pretext argument. So, while it may have
8 some issue with respect to the *prima facie* case, it
9 still does not fulfill his case to demonstrate pretext
10 on Continental's behalf.

11 Thank you, Your Honor.

12 THE COURT: Thank you.

13 Let's switch now to the plaintiff's motions
14 for summary judgment. Mr. Ashtiani, give me your best
15 shot on that.

16 MR. ASHTIANI: Thank you, Your Honor.

17 Your Honor, if I, may it please the court, to
18 indicate that as far as the attendance, Your Honor, I
19 do not understand what is the sales of a fraudulent
20 insurance to the employees has to do with attendance.
21 Okay. That is basically a discrimination here, because
22 they're denying benefits to one employee that has paid
23 for the benefits and then they turn around, give a
24 document that has been whited out. And it has happened
25 to other families here, that they have checked a

1 legitimate claim against the insurance company.

2 That has nothing to do with attendance, Your
3 Honor; that is something that, a cause of action needs
4 to be looked at. And I have been asked to provide the
5 name of the witnesses and supplement my answer, and I
6 have not done so because I'd like to maintain my
7 confidentiality into the names of those witnesses.

8 And they're bringing up issues that is
9 irrelevant, Your Honor, to the attendance issue, and
10 those things need to be looked at.

11 Your Honor, in regards to my own motion, I
12 have been denied a fair hearing, as you're well aware,
13 and that is within my constitutional rights. And
14 that's due process. Any man has the right to a fair
15 hearing. And that I was not given a fair hearing. And
16 prior to the hearing they had requested my final check.
17 That indication, Your Honor, that is a violation of
18 this Title 7, which we have before you.

19 Furthermore, Your Honor, plaintiff right and
20 the defendant's duty do not arise from express promise
21 made by either party, or from promise implied by law
22 because of benefit received or return of service, but
23 rather, from recognition of social right of equality,
24 of opportunity or person regardless of race.

25 Your Honor, I was denied to indicate what

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1 had happened, and that if I would have given the
2 opportunity, none of this would have happened. And
3 Mr. Mark Williams even indicates, hey, what is the
4 meeting about, and they do not allow him to have any
5 kind of indication what the meeting is all about.

6 Furthermore, Your Honor, in the Title 7 mostly
7 the district judges, the honorable judges had even in
8 Supreme cases are not interested to rehash what has
9 happened five years ago or neither what had happened
10 two years ago. What the court has stated in similar
11 cases are the languages, like the specific reason and
12 the stated reason for termination.

13 And the termination letter, Your Honor, such
14 as this, which has the Continental Micronesia logo on
15 it, the specific reason for the termination were two
16 days no-call no-show. Okay. I can even submit a Guam
17 Cell invoice that I called in to work and my call was
18 -- and that's a legitimate document; if the court asked
19 me to provide that, I can do that. And that the call
20 was made in, Your Honor, and that this is what the
21 legitimate complaint.

22 The defendant had oppor -- the defendant had
23 the right to write a 15-page termination letter and put
24 60 reasons that I was terminated. But, Your Honor,
25 that's not what this letter says. This letter says

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1 Ashtiani did not call in to work for June 23, June 24,
2 which is false. Because Joe Pangelinan declaration
3 states that Tony called in, and Ron Roberts declaration
4 states, Your Honor, that if Glenn Mendoza were to have
5 told Bill Herrera that Tony called in, none of this
6 would have happened. That's what this letter states,
7 Your Honor.

8 And in the Supreme Court cases, Aikens
9 (phonetic) and Burdine, it's clear, plaintiff can
10 prevail either by proving the discrimination more
11 likely motivated the decision, or that employer
12 articulated reason is unworthy of belief, Your Honor.
13 I have proven that, I have proven all these three
14 reasons that they're unworthy of belief, and I have put
15 that on my motion, on the first original motion that I
16 had submitted to the court.

17 And simply disproving defendant's reason is
18 enough, which I have done so, Your Honor. Plaintiff
19 need not also prove intentional discrimination, such
20 an approach unjustify and multiplies the plaintiff's
21 burden. And I have been burdened with that, and I have
22 proven that. And I have shown the statistics that
23 while 9.2 percent of the work force is minority, we
24 only were ten minorities, Your Honor, working for the
25 maintenance department. Out of that ten, three

1 minorities were terminated. And those statistical
2 evidence, Your Honor, just like the United case, is a
3 very important evidence before the court.

4 Your Honor, the reason that the Supreme Court
5 cases say articulate a reason for termination is
6 because two and a half years later the defendant wants
7 to change the reason for termination. They want to
8 say, well, Ashtiani didn't call up this day, or he
9 didn't call his supervisor, or this and that. That is
10 why they indicate articulate a reason for termination,
11 specific reason for termination, so they can't change
12 that later on down the road.

13 And, Your Honor, for Mr. McKinzie, with all
14 the respect to him, that he says that Mr. Lee's
15 termination was retracted in his affidavit, now, I
16 don't understand what's, you know, if his affidavit
17 is not true, I fear, Your Honor, Rule 56(g), that bad
18 affidavit made. And he states that Mr. Lee was
19 retracted, yet Mr. Lee is working at Sears. So in his
20 affidavit he says his termination was retracted, here
21 he's not working for CMI. I don't understand that in
22 his affidavit, Your Honor. If my affidavit is not
23 admissible, then I just need to understand, I need to
24 read the rule more then.

25 But, Your Honor, them changing the rule and

1 saying that, coming out with another affidavit of
2 Mr. Herrera and Mr. Glenn Mendoza; that they were off
3 island on the day that the motion was due to be
4 submitted, that is enough to affirm that evidence of
5 guilt.

6 And it states in here, Your Honor, the trier
7 of fact can reasonably infer from the falsity of the
8 explanation that the employer is dissembling to cover
9 up a discriminatory purpose. Such an interference is
10 consistent with the general purpose -- principle of
11 evidence law that the fact finder is entitled to
12 consider a party dishonesty about a material fact as
13 affirmative evidence of guilt.

14 And that's what we have here, Your Honor.
15 This affidavit states that Mr. Lee's termination
16 retracted; that is not true.

17 And that the defendant has -- furthermore,
18 Your Honor, I don't know if the court is aware that I
19 did submit an affidavit yesterday, one day prior to the
20 hearing, per Rule 56(c), and that defendant is relying
21 on manufactured e-mails, on internal e-mails from each
22 other, which those e-mails could not even be sent, and
23 that needs to be looked at, Your Honor.

24 And basically that's what I have. I do not
25 want to repeat what I have written to the court because

1 I know that this court is very thorough in looking at
2 documents. And plaintiff rests at this time, Your
3 Honor.

4 THE COURT: Thank you.
5 Defense?

6 MS. McDONALD: Thank you, Your Honor.

7 The issues with regard to Continental's motion
8 for summary judgment, and Mr. Ashtiani's motion for
9 partial summary judgment are the same. Mr. Ashtiani
10 has repeated his arguments in pretty much all the
11 documents that he's submitted. So except for the fact
12 that in his motion for partial summary judgment he does
13 not address two issues--one is the fraudulent insurance
14 and the second is the violation of FMLA. So his
15 bringing up the issue of fraudulent insurance is
16 misplaced at this time in the hearing.

17 For his motion for summary judgment, he has
18 to prove every element as the plaintiff in this case.
19 At this point, I'd like to incorporate all of our
20 arguments made during our motion for summary judgment
21 in response to his partial motion for summary judgment,
22 and claim that there are no genuine issues of material
23 fact, but instead, they are all in favor of
24 Continental, and that would be proper for granting
25 Continental's motion for summary judgment and denying

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1 his motion for partial summary judgment.

2 He, Mr. Ashtiani brings up an issue that
3 there's this invoice about cell phone calls that he
4 made to Continental. Well, he hasn't produced them.
5 And second of all, they don't show that he spoke to
6 supervisors, which is what was required of him under
7 Continental's attendance policy.

8 He brings up arguments regarding meetings that
9 happened after he was absent for two days and didn't
10 talk to his supervisors; those meetings are irrelevant
11 to this case.

12 He brings up Mr. Bruce Lee and wonders why
13 Mr. Lee works at Sears now. Well, that also has
14 nothing to do with this case. The fact is that
15 Mr. Ashtiani does not have any personal knowledge about
16 Mr. Lee's case, he was not his supervisor, he had no
17 supervisory capacity over Mr. Lee, and he does not know
18 the background behind Mr. Lee's termination and
19 subsequent retraction of that termination, and why
20 Mr. Lee no longer works for Continental right now.

21 Lastly, I'd like to just discuss the
22 supplemental affidavits that we had brought before the
23 court. Mr. Mendoza and Mr. Herrera were not available
24 to sign those affidavits by the time we filed our
25 motion, but we believe that all the documents that we

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1 submitted attached to our motion are properly
2 authenticated by Mr. McKinzie.

3 THE COURT: Thank you.

4 MS. McDONALD: Thank you.

5 THE COURT: Anything else, Mr. Ashtiani?

6 MR. ASHTIANI: No, Your Honor, plaintiff will
7 rest.

8 THE COURT: The court will take this under
9 advisement. Thank you very much.

10 MS. McDONALD: Thank you, Your Honor.

11 MR. ASHTIANI: Thank you, Your Honor.

12 (Whereupon proceedings concluded.)

13 * * *

14 CERTIFICATE OF REPORTER

15 CITY OF AGANA)
16) ss.
17 TERRITORY OF GUAM)

18 I, Wanda M. Miles, Official Court Reporter
19 of the District Court of Guam, do hereby certify the
20 foregoing pages 1-23, inclusive, to be a true and
21 correct transcript of the shorthand notes taken by me
22 of the within-entitled proceedings, at the date and
23 time therein set forth.

24 Dated this 22nd day of January, 2004.

25 Wanda M. Miles

Wanda M. Miles
Official Court Reporter
District Court of Guam